

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF TEXAS  
3 HOUSTON DIVISION

4 IN RE: \* 4:14-CV-00548  
5 \*  
6 \* 8:20 A.M.  
7 CONN'S SECURITIES \*  
8 LITIGATION \* JUNE 29, 2017

9 HEARING ON CLASS CERTIFICATION  
10 BEFORE THE HONORABLE KEITH P. ELLISON  
11 Volume 1 of 1 Volume

12 APPEARANCES:

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1 **PROCEEDINGS**

2 THE COURT: Thank you. Please sit down. Sorry  
3 for the delay in starting. It's entirely my fault.

4 Okay. I know you have just been through it with the  
5 court reporter, but we'll go through it one more time.  
6 Appearances of counsel in Conn's Securities Litigation,  
7 starting with the plaintiffs.

8 MR. GARDNER: Good morning, Your Honor. Jonathan  
9 Gardner with Labaton Sucharow for the plaintiffs.

10 MS. FOX: Christine Fox, also with Labaton  
11 Sucharow.

12 THE COURT: Thank you.

13 MS. WEINTRAUB: Good morning, Your Honor.  
14 Deborah Clark-Weintraub with Scott & Scott for the  
15 plaintiffs.

16 THE COURT: Thank you.

17 MR. SCHWARTZ: Good morning, Your Honor. Max  
18 Schwartz, also with Scott & Scott, for plaintiffs.

19 MR. HUGHES: Good morning, Your Honor. James  
20 Hughes with Motley Rice for the plaintiffs, as well.

21 THE COURT: Okay. And then for the defendants.

22 MS. POPPE: Good morning, Your Honor. Jennifer  
23 Poppe with Vinson & Elkins for the defendants.

24 MS. EVANS: Good morning, Your Honor. Meriwether  
25 Evans, also with Vinson & Elkins, for the defendants.

1 THE COURT: Welcome to both of you.

2 First, let me thank you for the papers, which were  
3 well done. In a difficult case like this I feel, as I  
4 have said before, very gratified to have some of the  
5 nation's best lawyers working on it.

6 Have you discussed among yourselves how you wish to  
7 proceed?

8 MR. GARDNER: We have not, Your Honor. We are  
9 happy to proceed in any manner.

10 THE COURT: Well, it's your motion. Do you need  
11 -- does anybody need to make an opening statement or  
12 anything? I don't think it's necessary.

13 MS. POPPE: No, Your Honor. It was our  
14 understanding we had about an hour. Is that how much you  
15 have --

16 THE COURT: Well, that's how much we will start  
17 with. I can push -- I can push a little bit if we need  
18 more time. We have a preliminary injunction hearing  
19 that's already gone on for eight days. So they can't be  
20 too possessive about courtroom time.

21 MR. GARDNER: They have had their share.

22 THE COURT: Yeah. Yeah. Nobody gives the judge  
23 any respect. They just go on and on.

24 MR. GARDNER: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. GARDNER: Jonathan Gardner for the  
2 plaintiffs.

3 I don't know, Your Honor, if there is a particular  
4 issue that you would like me to focus on. Otherwise, I  
5 can just run through it.

6 THE COURT: Well, I think the -- the critical  
7 issue is the fifth *Cammer* factor -- *Cammer* is  
8 C-a-m-m-e-r -- whether or not it is necessary to establish  
9 market efficiency or whether I would be making new law to  
10 hold that.

11 MR. GARDNER: We do cite, Your Honor, a couple of  
12 cases that suggest that one particular *Cammer* factor does  
13 not make or break the market efficiency analysis.

14 THE COURT: In overall tests?

15 MR. GARDNER: It is in overall tests. In fact,  
16 the Fifth Circuit in the *Unger* case specifically  
17 criticized the district court judge for only analyzing  
18 three of the *Cammer* factors, one of which was the fifth  
19 *Cammer* factor; and the Court said that that's not a  
20 sufficient analysis of market efficiency.

21 It looked -- I believe the *Unger* district court looked  
22 at the cause and effect fifth *Cammer* factor, looked at the  
23 volume and looked at the number of market makers; and  
24 that's all that was in the analysis.

25 And the Fifth Circuit said that's not a sufficient

1 analysis of all of the *Cammer* factors and other factors.  
2 I think *Unger* enumerated eight factors, three beyond the  
3 *Cammer* court, and said that that is not even an exhaustive  
4 list of an analysis of market efficiency.

5 And so, Your Honor, I think that they are just wrong  
6 in suggesting to you that you can simply ignore all of the  
7 other *Cammer* factors and factors in *Unger*.

8 And in this case, the record is clear, every single  
9 one of those other factors, the average weekly trading  
10 volume, the number of security analysts that followed the  
11 company, whether market makers traded in the stock,  
12 eligibility to file SEC Registration Form S-3 filings, the  
13 market -- the company's market cap, the bid-ask spread for  
14 the stock, the level of institutional traders that hold  
15 stock -- and sophisticated institutions hold the majority  
16 of the stock in Conn's during the class period -- and the  
17 existence or lack of existence of autocorrelation, all of  
18 those factors are important.

19 In fact, *Cammer* itself said, over a certain threshold,  
20 average weekly trading volume gives you a presumption, a  
21 strong presumption of market efficiency. It's not just a,  
22 you know, necessary factor that exists. It's actually  
23 proof of market efficiency.

24 And, you know, as the Supreme Court held in  
25 *Halliburton*, the test of market efficiency is it is not

1 binary. It's not yes or no. It's a matter of proof.  
2 It's a matter of degree and which is why they made the  
3 presumption rebuttable.

4 So I start with the proposition that the defendants  
5 urging for you to ignore all the other *Cammer* factors and  
6 *Unger* factors is just wrong as a matter of law. I think I  
7 would suggest that you look at all of them.

8 THE COURT: You are saying you don't look just at  
9 the fifth *Cammer* factor or any one *Cammer* factor. You  
10 look at all of them. But in any event, you have satisfied  
11 the fifth one, too?

12 MR. GARDNER: Exactly, Your Honor. I can walk  
13 through why we satisfy the fifth factor. The fifth factor  
14 generally we have put in -- we have put forward an expert  
15 report in this case, Mr. Coffman's expert report.

16 THE COURT: Yes. Coffman is C-o-f-f-m-a-n.

17 MR. GARDNER: He did an event study, which the  
18 defendants don't challenge that that's the appropriate  
19 methodology to testing cause and effect.

20 He analyzed earning days. And in his report in a  
21 footnote, I think Paragraph 55, he gives support for why  
22 testing earning days is the appropriate way -- is an  
23 appropriate way to test cause and effect.

24 So he took a completely objective set of dates,  
25 earnings announcements where you would expect there to be

1 company specific news that comes out, the company is  
2 announcing its prior quarter earnings, it's making  
3 projections, it's talking to the market. So that's a good  
4 indicator of a day in which the market is learning  
5 information about the company.

6 He then contrasted that through a statistical analysis  
7 to days in which he did a search and found no news on the  
8 company, no news reports, no filings from the company, no  
9 analysts were talking about the company on those days; and  
10 he identified 100 such non-news days.

11 He ran his event study, his regression analysis. And  
12 there is no dispute that the event study was run  
13 appropriately. They don't challenge the indexes he used  
14 or his event study methodology. And he found that on  
15 9 of 9, 100 percent of the time the company announced  
16 earnings, the stock price moved in a statistically  
17 significant manner. 100 percent versus 8 percent. 8 out  
18 of 100 on non-news days, the stock moved in a  
19 statistically significant manner. The difference between  
20 8 percent and 100 percent is itself statistically  
21 significant.

22 And you would expect, through the regression analysis  
23 bell curve, that 5 percent of the time there would be  
24 movement, unexplained statistically significant movement.  
25 So the 8 percent is no different than what you would

1 expect through just normal stock price movements.

2 So the difference between 100 percent of the time on  
3 news days versus 8 percent of the time on non-news days is  
4 powerful empirical evidence of a cause and effect.

5 THE COURT: Okay. I've got you.

6 MR. GARDNER: There is more analysis that he  
7 does, the stock moves, changes in much higher volume, et  
8 cetera.

9 THE COURT: Let me hear from the defendants on  
10 this. My question for the defendants is: Is there any --  
11 is there any authority in the Fifth Circuit that the fifth  
12 *Cammer* factor is necessary for a showing of market  
13 efficiency?

14 MS. POPPE: I am not aware of any case within the  
15 Fifth Circuit holding what you just said there.

16 THE COURT: Okay.

17 MS. POPPE: The fifth *Cammer* factor is certainly  
18 the most important of the five *Cammer* factors, and it is  
19 the one that is more the direct test on efficiency.

20 THE COURT: You don't disagree with counsel that  
21 you look at all of them, at least five or eight, depending  
22 on which list you look at? You don't disagree that it's  
23 an analysis of all of them, not just one of them, right?

24 MS. POPPE: I don't disagree that courts often  
25 look at all of them. I would point out here one

1 interesting fact though. In connection with the analysis  
2 that they did on the options and the series of options,  
3 the only factor that Mr. Coffman looked at was *Cammer*  
4 factor five. He did not analyze all of the others.

5 THE COURT: Well, is the analysis for options  
6 different from the analysis for common shares?

7 MS. POPPE: Yes, it is. They are traded in a  
8 very different way. There are not near as many of them.  
9 Their volume is much less.

10 So, for example, the *Cammer* factor that looks at  
11 volume of trading, if you were to look at that with  
12 respect to options, it would be much less; and there are  
13 different series of options, each with different strike  
14 prices and different maturity dates that may be treated  
15 very differently by the market. So, yes, it's important  
16 to analyze that separately.

17 The plaintiffs' expert did not have any authority that  
18 he presented that would suggest that they are traded the  
19 same or that they should be analyzed just the same; and in  
20 fact, they are very different.

21 And our expert walks through why they are different,  
22 walks through some of the different issues associated with  
23 them and points out some of the issues associated with why  
24 they may not be traded on such an efficient market.

25 So it's interesting here we have the plaintiff saying

1 you must look at all of them with respect to the market,  
2 that common stock as a whole. Look to all of them. Don't  
3 just focus on *Cammer* factor five, and it's okay if we  
4 didn't do as good of a job there as we could have.

5 But then on the options, all they are looking at is  
6 *Cammer* factor five. You can't have it both ways.

7 THE COURT: Okay. In *In Re Enron Corporation*,  
8 529 F.Supp.2d 644 at 754, the Court held that evidence  
9 applying the *Cammer/Unger/Bell* factors -- and the way the  
10 Court wrote it was *Cammer*, C-a-m-m-e-r, slash, Unger,  
11 U-n-g-e-r, slash *Bell* -- evidence applying the  
12 *Cammer/Unger/Bell* factors to stock is sufficient to  
13 trigger the fraud-on-the-market presumption for claims  
14 based on options.

15 And in another case, the *McIntire v. China Media*  
16 *Express* -- McIntire is M-c-I-n-t-i-r-e -- the Court held  
17 the market price for options is directly responsive...to  
18 changes in the market price of the underlying stock and to  
19 the information affecting that price.

20 So I don't know that it really is a separate analysis.

21 MS. POPPE: Well, it could be done the exact same  
22 way; and I'm not suggesting that option trading could  
23 never be done on an efficient market. But simply here,  
24 the analysis that the plaintiffs' expert did was not  
25 sufficient to meet their burden to show that the options

1 or even the common stock was traded on a sufficient  
2 market.

3 And I don't mean to suggest that you could never get  
4 there or that the *Cammer* factors would not be the  
5 appropriate way to look at both but just simply that the  
6 plaintiffs' expert here did not do enough to satisfy their  
7 burden to show it.

8 THE COURT: Okay. Thank you very much.

9 Mr. Gardner.

10 MR. GARDNER: Your Honor, one other point that  
11 actually applies to both the common stock and the options  
12 is there is no opinion from the defense side, from their  
13 expert or otherwise, that the market for the common stock  
14 or the options is inefficient. They just simply try to  
15 suggest, nitpick I would say.

16 THE COURT: But it is your burden, isn't it?

17 MR. GARDNER: It is our burden. But generally,  
18 if they felt strongly that the market was not efficient,  
19 they would have come forward, I would submit, with an  
20 expert report of their own suggesting for the following  
21 reasons why the market is not efficient.

22 With respect to the options, Your Honor, I think that  
23 Your Honor is right, the *Enron* decision that you quoted;  
24 and I would just add to that that there is a Mr. Stulz,  
25 the defendants' expert --

1 THE COURT: Spell that for the court reporter.

2 MR. GARDNER: S-t-u-l-z. At Paragraph 39 of his  
3 report he starts his discussion of options with the  
4 admission that options are derivative of common stock, and  
5 most courts find that that in and of itself is sufficient.

6 And Mr. Coffman went further. He did test the  
7 cause-and-effect relationship between options on news days  
8 versus non-news days, and the statistics are just as stark  
9 as they were for the common stock.

10 On earnings days, 8 of 9 call options, 89 percent,  
11 moved in a statistically significant way versus 9 of 100  
12 on non-news days. So that's 9 percent versus 89 percent.

13 And on -- on put options, 9 of 9 times put options  
14 moved in a statistically significant way on news days  
15 versus 7 of 100, 7 percent.

16 So the difference between the options trading  
17 statistically significant versus non-news days is strong  
18 empirical evidence that the market for options was also  
19 efficient.

20 He also did analysis of the absolute abnormal change  
21 in the options on news days versus non-news days; and it  
22 is again stark, 65 percent of call option. The market  
23 moved 65 percent on news days versus only 8 percent on  
24 non-news days.

25 So there is a lot of information in Mr. Coffman's

1 report on options that make the point that the market is  
2 efficient.

3 And some of the *Cammer* factors that apply to common  
4 stock apply equally to options. Number of analysts that  
5 follow the stock, that's the same. The market makers,  
6 that analysis is the same. So some of the *Cammer* factors  
7 that he applied for the common stock apply with equal --  
8 equal weight for the options, which is why most courts say  
9 you don't need to do an independent analysis if the common  
10 stock moves -- if the common stock is efficient, the  
11 trading and the options is efficient.

12 THE COURT: Just give me a brief primer on how  
13 options are priced. Is it, you think, responsive to what  
14 is going on generally in the world of finance; or is it  
15 entirely driven by the market price of the underlying  
16 security in its pattern of increase and decrease?

17 MR. GARDNER: I think it is predominantly  
18 derivative of the common stock; and by saying that, what  
19 I'm suggesting is --

20 THE COURT: Bet on whether you are going to have  
21 to put or hold -- put or sell, I'm sorry.

22 MR. GARDNER: The information that's in the  
23 market is driving the price of the stock, and it's driving  
24 the price of the options. People interpret that  
25 information differently, which is why you have people

1 willing to buy and people willing to sell at different  
2 prices.

3 But the underlying information in the market is  
4 setting price, and it's the same information that is in  
5 the market. The analysts reports and what they are saying  
6 about the stock, the information that the company is  
7 providing to the market, all of that is factored into what  
8 people are willing to buy and sell, whether it's common  
9 stock directly or whether it's a derivative product such  
10 as options or other esoteric securities.

11 THE COURT: So do you think the efficiency of the  
12 options market is linked directly to the efficiency of the  
13 common share market?

14 MR. GARDNER: I do.

15 THE COURT: Okay. Both sides make good  
16 arguments, but I do believe I have to hold that plaintiffs  
17 have satisfied the five *Cammer* factors as to both stock  
18 and options.

19 So does that leave us -- we still have whether  
20 plaintiffs are adequate class representatives and one of  
21 the lead plaintiffs whether St. Paul is atypical. Is it  
22 time to turn to those?

23 MR. GARDNER: Absolutely, Your Honor. I just  
24 want to -- your voice dropped off a little bit, and it was  
25 an important point. I just want to make sure I heard you

1 correctly that you said that the plaintiffs did, in fact,  
2 satisfy the *Cammer* factors.

3 THE COURT: Yes. That's what I said.

4 MR. GARDNER: Okay. Thank you for that clarity.

5 So let me talk about the adequacy and typicality  
6 arguments that the defendants make, and let me start with  
7 the typicality argument that they make solely with respect  
8 to St. Paul, one of the four institutional investors that  
9 are seeking -- that are lead plaintiffs that are seeking  
10 to be class representatives in this case.

11 The argument is that some of St. Paul's purchases  
12 happened after certain corrective disclosures. I should  
13 point out, first, that those purchases took place in the  
14 class period as defined. So before the final two  
15 corrective disclosures, St. Paul purchased some additional  
16 shares. They purchased the bulk of their shares before  
17 the first two corrective disclosures, but they did  
18 purchase some after the first two corrective disclosures  
19 but before the final corrective disclosure. And the  
20 defendants' argument is that that makes them atypical  
21 because they purchased after some revelation of the truth  
22 was in the market.

23 The problem with that argument is that it runs  
24 squarely into the Fifth Circuit decision in *Feder v.*  
25 *Electric Data Systems Corporation*.

1 THE COURT: Yeah, I saw that.

2 MR. GARDNER: I think that ends the argument.

3 The Fifth Circuit clearly said that that argument does not  
4 preclude a lead plaintiff from establishing typicality,  
5 and that the rationale is that reliance on the integrity  
6 of the market price -- and this is a quote from that  
7 decision.

8 "The reliance on the integrity of the market price  
9 prior to disclosure of the alleged fraud, i.e., during the  
10 class period, is unlikely to defeat -- to be defeated by  
11 post-disclosure reliance on integrity of the market. This  
12 seems particularly so after the stock price has been  
13 corrected by the market's assimilation of the new  
14 information."

15 And I think what the Fifth Circuit was driving at,  
16 which is class members are allowed to continue purchasing  
17 the company's stock after a correction. St. Paul believed  
18 and St. Paul's advisors believed that the fraud had  
19 dissipated out of the stock and the stock price had  
20 dropped, and they continued to purchase stock. That  
21 doesn't make them atypical. In fact, I would say that  
22 makes them typical.

23 I would submit, Your Honor, that most class members  
24 likely continue to purchase or at least a great majority  
25 of them. It doesn't -- it doesn't render them atypical,

1 and it doesn't threaten to be a focus of the litigation at  
2 trial.

3 The cases that the defendants rely upon I think are  
4 easily distinguishable. We do that in our brief. The  
5 Rocco case from the Southern District of New York had a  
6 plaintiff in which the evidence showed that the plaintiff  
7 had specific knowledge of a second fraud during the  
8 purchasing of the stock.

9 That's a completely different scenario than what we  
10 have here. And so I think that that is -- that's an easy  
11 argument to deal with, given the Fifth Circuit's  
12 pronouncement in *Feder*.

13 With respect to adequacy, they make an adequacy  
14 argument against all four of the lead plaintiffs. I would  
15 first point out that we have four institutional investors  
16 seeking to be class representatives. They each have  
17 hundreds of millions, if not billions, of dollars in  
18 assets. They are sophisticated. They have the resources,  
19 and they have shown in this case that they are -- they  
20 understand their fiduciary duties. That's in the  
21 deposition transcripts we cite.

22 They understand they are representing a class, and  
23 they've engaged with counsel. We have had regular updates  
24 with them, discussions. They've reviewed the pleadings  
25 and the court filings. They have done everything that is

1 necessary of a lead plaintiff to lead a securities class  
2 action. They have experience doing -- doing this.

3 I would suggest that, you know, the arguments that the  
4 defendants make picking out little pieces of their  
5 deposition transcripts where they didn't draft the  
6 complaint, well, I don't know any client in any  
7 litigation, securities litigation, breach of contract,  
8 where the client drafts the complaint or drafts  
9 declarations on their behalf. That's what the lawyers do.

10 These are -- this is sophisticated complex litigation.  
11 You need years and years of experience to be -- to draft  
12 complaints and draft pleadings. Clients are not in a  
13 position to do those things.

14 So their focus on the fact that the client didn't  
15 draft certain things, didn't make changes to the complaint  
16 I think are really red herrings.

17 What is important are that these people have the  
18 resources. They are interested in representing the class.  
19 They understand their fiduciary duties, and they are  
20 prepared to be class representatives.

21 I think if Your Honor reads the deposition transcripts  
22 that are in the record, there is overwhelming evidence in  
23 there that each of these representatives understood the  
24 case, they knew what the class period was, they knew who  
25 the defendants were, they understood the basic claim in

1 the case and they testified that they understood their  
2 fiduciary responsibilities.

3 As far as case law is concerned, I would simply point  
4 Your Honor back to your own original decision in the *BP*  
5 case, the original case in which you seemed to have no  
6 difficulty in finding the institutional investors in that  
7 case sophisticated. And I believe you looked at the fact  
8 that: They were institutions. They had the resources.  
9 They had produced documents. They were engaged  
10 sufficiently.

11 So I think on the adequacy front we more than have  
12 sufficient evidence in the record that each of these  
13 institutional investors are adequate.

14 THE COURT: Okay. Thank you. Thank you.

15 MS. POPPE: Would you like me to go --

16 THE COURT: Is there anything more -- before we  
17 move on finally, is there anything more you would like to  
18 say about the first issue, the predominance issue? I just  
19 find it -- I think you have made very good arguments in  
20 your brief, but I think the case law is against your  
21 client's position on this.

22 And I'm not talking to you. Sit down. I'm sorry.

23 MR. GARDNER: I am sorry, Your Honor. You scared  
24 me there for a minute.

25 THE COURT: I am sorry. I thought you had left

1 the rostrum.

2 MS. POPPE: With respect to your question about  
3 market efficiency as a whole?

4 THE COURT: Yes.

5 MS. POPPE: I think everything that we have said,  
6 we have said in the papers and I have said already.

7 THE COURT: All right.

8 MS. POPPE: I would say, though, that that  
9 doesn't answer the question of whether we have  
10 successfully rebutted the presumption of price impact.  
11 That's a different question we haven't talked about yet.

12 THE COURT: On price impact, I find that argument  
13 a little bit hard to negotiate. You fault Mr. Coffman  
14 because his methodology supposedly failed to consider  
15 whether any of the earnings days contained value relevant  
16 news, and you even included days on which release of  
17 earnings was announced. I don't know how that could not  
18 be value relevant news.

19 MS. POPPE: Right. And that, to me, really goes  
20 more to the first initial question of is this an efficient  
21 market --

22 THE COURT: Okay.

23 MS. POPPE: -- and not necessarily to the  
24 separate question of was there, as *Halliburton II* said you  
25 could, rebut the presumption by showing that there was no

1 price impact.

2 This is what Dr. Stulz really focused on in part -- in  
3 a separate part of his opinion. And I have -- if I may,  
4 Your Honor, hand you --

5 THE COURT: Hand it to Mr. Rivera. Have you got  
6 a copy for the other side?

7 MS. POPPE: They already have one.

8 THE COURT: Thank you.

9 MS. POPPE: So the focus here is really about --  
10 from a price impact standpoint really becomes much more  
11 about was there an impact to the stock price in connection  
12 with either, one, the misrepresentation or, two, the  
13 corrective disclosure.

14 And in *Halliburton II*, in connection with considering  
15 the underlying nature of the fraud-on-the-market theory,  
16 the Supreme Court recognized that if the market is  
17 efficient then there is a presumption of a  
18 fraud-on-the-market theory. But specifically said, that  
19 presumption may be rebutted if there is no price impact.

20 THE COURT: I understand that. I'm with you on  
21 that point.

22 MS. POPPE: Okay. And so do you want me to go  
23 ahead and talk about the price impact issue now?

24 THE COURT: Yeah.

25 MS. POPPE: So in connection with price impact,

1 the issue here is the plaintiffs' theory is they made  
2 statements on a certain day, three days in particular,  
3 that caused the stock price to artificially increase.  
4 That's the way they have alleged it in their complaint.

5 THE COURT: Yeah. Their most recent complaint.

6 MS. POPPE: Right. And in fact, it turns out, if  
7 you actually look at the intraday stock pricing on those,  
8 on two of the three days, it makes clear that the increase  
9 actually happened before the earnings call where they  
10 complain the statements at issue were made.

11 And so, in fact, the statements that they are  
12 complaining about here on two of the three days it's clear  
13 did not impact the price of the stock. And, therefore,  
14 according to *Halliburton II*, that is a way -- an adequate  
15 way to rebut the presumption that there was a price impact  
16 and that there was a quote-unquote fraud on the market,  
17 which is what the whole market efficiency issue is about.

18 And so for -- with respect to April 3rd -- and if you  
19 look at -- I think it's illustrative to look at -- and the  
20 pages are sort of numbered on the side -- Page 3 of what I  
21 handed you and Page 4, this is from the plaintiffs'  
22 expert's report. These charts are the intraday trading  
23 charts for April 3rd and for December 5th, the two days  
24 that we are challenging.

25 And if you look over on the right or on the left-hand

1 side of that chart you can see, for example, on Page 3,  
2 the April 3rd chart you can see the stock price close the  
3 previous day at \$36.08. Conn's issued a press release  
4 before the market opened the next day, and the result of  
5 that press release was that the opening price for Conn's  
6 that day was 39.30. So the price increase that they are  
7 wanting to attribute to their alleged misstatements here  
8 actually occurred before those statements were ever made.

9 And this is very similar to the Eighth Circuit opinion  
10 in *Best Buy* where the Eighth Circuit and the underlying  
11 court looked at this very issue and said the stock price  
12 occurred --

13 THE COURT: The stock price increase?

14 MS. POPPE: Yes. The stock price increase  
15 occurred prior to what you are complaining about. And if  
16 there is no price impact from the statements themselves,  
17 then you have effectively rebutted them.

18 THE COURT: Well, I didn't see in your analysis  
19 or Dr. Stulz's analysis any accounting for the -- whether  
20 there was a statistically significant price decrease when  
21 the truth was revealed.

22 MS. POPPE: So that's an important question, and  
23 you don't need to show both is our --

24 THE COURT: Oh, really?

25 MS. POPPE: -- is our position. I can walk you

1 through why I don't believe *Halliburton II* requires you to  
2 show both.

3 The plaintiffs cite in their case the Fifth Circuit  
4 *Halliburton* opinion which preceded the Supreme Court  
5 *Halliburton II* decision that I'm referring to. In that  
6 opinion, the Fifth Circuit does make reference, when it  
7 was talking about loss causation, to looking at both.

8 But the Supreme Court *Halliburton II* decision does not  
9 say that. In fact, if you look at Page 6 of what we  
10 handed out, this is a quote from *Halliburton II*.

11 "Basic itself made clear that the presumption was just  
12 that and could be rebutted by appropriate evidence,  
13 including evidence that the asserted misrepresentation or  
14 its correction --" it doesn't say both "-- or its  
15 correction did not affect the market price of the  
16 defendants' stock."

17 And the Court goes on to talk about a hypothetical  
18 example of looking at this, and this hypothetical is on  
19 Page 2415 of the opinion. And in that hypothetical,  
20 again, the Court is really only talking about what  
21 happened on the day the misrepresentation was made.

22 THE COURT: So you say that even after a  
23 clear-the-air disclosure, this is what we should have said  
24 earlier, no matter how much the stock decreases, that  
25 doesn't help with the analysis of price impact?

1 MS. POPPE: No. Yes, exactly. I am saying that  
2 you can rebut the presumption, the fraud-on-the-market  
3 theory presumption, by showing no price movement either on  
4 the day of the alleged misrepresentation or on the date of  
5 corrective disclosure. You don't have to show both.

6 THE COURT: No. I --

7 MS. POPPE: Did I misunderstand your question?

8 THE COURT: No. You have got the question right.  
9 Let me see just a second.

10 MS. POPPE: I can continue to walk you through  
11 why.

12 THE COURT: No. Let me just ask you about one  
13 case, *Erica, E-r-i-c-a, P as in Paul, John, J-o-h-n, Fund*  
14 *v. Halliburton* says -- it says, "To successfully prove a  
15 lack of price impact, defendants would, quote, be required  
16 to demonstrate both that the stock price did not increase  
17 when the misrepresentation was announced and that the  
18 price did not decrease when the truth was revealed."

19 So is there some tension in the *Halliburton* cases?

20 MS. POPPE: Yes. In fact, that case is what then  
21 went up to the Supreme Court --

22 THE COURT: Yeah. It got vacated. I know.

23 MS. POPPE: -- and was vacated; and the Supreme  
24 Court did not say you have to do both.

25 And the Eighth Circuit has agreed with that

1 interpretation and held you do not need to do both.

2 THE COURT: But -- okay. But on the point -- on  
3 the point that we're talking about, isn't -- irrespective  
4 of the Eighth Circuit, isn't the Fifth Circuit law that  
5 you have to demonstrate both?

6 MS. POPPE: No, Your Honor, I don't believe so,  
7 because that opinion that the Fifth Circuit wrote  
8 there then went up --

9 THE COURT: It vacated but not on that point, did  
10 it?

11 MS. POPPE: Yes, on this very point. This is the  
12 very issue that the Supreme Court decided: Can you and  
13 how can you rebut the presumption for fraud on the market?

14 THE COURT: That just seems remarkable that you  
15 reveal I have lied in the past and the market tanks and  
16 plaintiffs are without a cause of action. That really  
17 seems like a remarkable statement.

18 MS. POPPE: Well, there are lots of elements to a  
19 10b-5 case here, including an injury.

20 THE COURT: Yeah, I know.

21 MS. POPPE: Their whole case is based on the idea  
22 that the statement artificially inflated the value of the  
23 stock. That's their allegation it was artificially  
24 inflated.

25 It turns out it was not artificially inflated here.

1 The market didn't care. And if the market didn't care,  
2 then there is no lawsuit. There is no injury. There is  
3 no -- there is no damage.

4 Now, what happened down the road and those stock price  
5 drops, there could be lots of reasons for those.

6 THE COURT: Well, of course there can. Of course  
7 there can. There could be lots of reasons that the stock  
8 didn't increase when the misrepresentations were made,  
9 such as bad news elsewhere in the world or bad news  
10 elsewhere in the economy. That's one reason these cases  
11 are hard.

12 But I think I disagree with your client on the -- on  
13 the consequences of a decline after a misrepresentation  
14 was corrected.

15 MS. POPPE: And I don't see that the Fifth  
16 Circuit has revisited this. I think there are some  
17 district court cases that have said what you've just said,  
18 you need to show both.

19 I think the Eighth Circuit -- I think Judge Lynn, when  
20 *Halliburton* went back down, looked at simply just one side  
21 of it. She didn't look at both sides of it.

22 I think this is an open question within the Fifth  
23 Circuit how to interpret it; but my opinion is that the  
24 *Halliburton II* case makes clear what the Supreme Court's  
25 intention is. You can decide one or the other. You don't

1 need to decide both.

2 THE COURT: Okay. Let's talk a little bit about  
3 damages on a class-wide basis.

4 MR. GARDNER: Your Honor, before can I -- I  
5 haven't had a chance to talk about price impact. Do you  
6 want me to respond before you move on?

7 THE COURT: That's fair. That's the way we have  
8 been going. We have been going that way, kind of an  
9 iambic pattern, first one and then the other.

10 MS. POPPE: And we will at some point -- because  
11 there is an important point I want to make as it relates  
12 to the length of the class period.

13 THE COURT: Yeah. Right. We'll talk about that.

14 MS. POPPE: Okay.

15 THE COURT: For those who are here on the prison  
16 case, we're not going to start at 10:00. I'm sorry. It  
17 will be at least 10:30. I am sorry. I apologize.

18 MS. POPPE: Your Honor, I'm sorry. One more  
19 thing. Should I go ahead and address adequacy and  
20 typicality or should I wait until later?

21 THE COURT: No. We'll come back to that. You  
22 will have another chance. We'll stay here until the earth  
23 looks flat if we need to. Don't worry.

24 MR. GARDNER: Sorry, Your Honor. So let me -- I  
25 can be pretty brief on the price impact point. I just --

1 the demonstrative, I just didn't want my silence to go as  
2 we -- I don't have a problem with her handing it up. We  
3 don't agree that it's accurate in certain respects.

4 THE COURT: I know you don't. You don't have to  
5 burden that point. I know you don't.

6 MR. GARDNER: Okay. I didn't want to --

7 THE COURT: I know you didn't want to acquiesce  
8 -- your silence to be construed as acquiescence. I  
9 understand.

10 MR. GARDNER: Thank you, Your Honor.

11 So with respect to the price impact point, I think  
12 Your Honor has it exactly correct. That is, it is the  
13 defendants' burden, they don't dispute that, to prove a  
14 lack of price impact. They have to prove both a lack of  
15 price movement on the misrepresentation and --

16 THE COURT: What is your authority for that? We  
17 seem to have a disagreement about whether the Fifth  
18 Circuit law on that was vacated.

19 MR. GARDNER: Two things, Your Honor. The Fifth  
20 Circuit decision in *Halliburton*, which you quoted, was not  
21 vacated on that ground.

22 THE COURT: I didn't think so, but we have a  
23 disagreement on that.

24 MR. GARDNER: I'll point you to a recent  
25 decision. It's actually a report and recommendation by

1 Judge Mitchell in the Eastern District of Texas, which has  
2 been adopted and approved by Judge Schroeder of that  
3 court.

4 And the magistrate judge's decision -- and I'll just  
5 quote it -- says price -- and this is post the Supreme  
6 Court decision. This is from 2016. And Judge Schroeder's  
7 decision was signed on March 8th of 2017. It is a very  
8 recent decision out of district court -- district court in  
9 the Fifth Circuit.

10 The magistrate judge's opinion says, and I'm quoting,  
11 "Price impact can be shown either by an increase in price  
12 following a fraudulent public statement or a decrease in  
13 price following a revelation of the fraud." Citing *Erica*  
14 *P. John Fund, Inc. v. Halliburton*, Fifth Circuit decision,  
15 718 F.3rd 423. Vacated and remanded on other grounds by  
16 134 Supreme Court 2398.

17 So at least these two judges interpret it the way that  
18 you do, which is it was vacated on other grounds.

19 That -- how you go about rebutting price impact, the  
20 Supreme Court didn't opine on in *Halliburton*. And the  
21 decision on remand in *Halliburton* -- this is now coming  
22 back from the Supreme Court, and the citation there is 309  
23 F.R.D. 251 -- says "Under price impact,  
24 fraud-on-the-market securities litigation typically  
25 focuses on a price change at the time of a corrective

1 disclosure; and if the particular disclosure causes the  
2 stock price to decline at the time of disclosure, then the  
3 misrepresentation must have had -- must have made the  
4 price higher than it would have otherwise been without the  
5 misrepresentation."

6 THE COURT: I'm going to have to -- I'm going to  
7 have to --

8 MR. GARDNER: So I think there is ample  
9 support --

10 THE COURT: I think I'm going to have to reject  
11 Conn's position on this. It was well argued. I  
12 appreciate that. At least at this stage, I have to go  
13 with the plaintiff.

14 Maybe we are -- I am wrong about this, but I think the  
15 Fifth Circuit will be able to tell me. And there may be  
16 intervening law from the Fifth Circuit before we get to  
17 trial.

18 MR. GARDNER: Let me -- let me give you a little  
19 more comfort; and that is, I would submit all of the  
20 circuit courts that have looked at this seriously have  
21 concluded similarly that price impact can be shown either  
22 by the increase after the misrepresentation or the  
23 decrease.

24 The Second Circuit in this *China Media Express* case;  
25 the Seventh Circuit *Glickenhau*s case; the Ninth Circuit in

1 a case -- I don't know the citation, but I can get it for  
2 you -- the Eleventh Circuit in the *FindWhat* case, I mean,  
3 all those decisions support the position that Your Honor  
4 is articulating.

5 And it makes perfect sense because, as you indicated,  
6 you don't expect there to be a price increase every time a  
7 defendant makes a misrepresentation to the market. There  
8 are certain statements --

9 THE COURT: The market doesn't know it. The  
10 market doesn't know it's a misstatement.

11 MR. GARDNER: Doesn't know it's a misstatement.  
12 Plus, certain statements, like the ones we have in this  
13 case, are designed to maintain a price. In other words,  
14 everything is going well, when the company knows  
15 everything is not going well.

16 THE COURT: I'm satisfied on this point.

17 MR. GARDNER: And *Best Buy* -- just so the record  
18 is clear, *Best Buy* is easily distinguishable, the Eighth  
19 Circuit decision. There are three things that plaintiffs'  
20 expert admitted in that case, one of which was the  
21 plaintiff admitted that there was no price impact. That's  
22 an admission by the expert. So we, obviously, don't have  
23 that here.

24 And the news that came out before the stock, you know,  
25 the press release that came out that caused the stock to

1 go up in that case was virtually identical to the  
2 information that came out in the earnings call. And so  
3 there was no different -- no difference in the statements,  
4 and the statements in the press release were just found  
5 not to be misrepresentations because they were protected  
6 by the safe harbor.

7 So the statements that caused the movement were not  
8 actionable. The statements that came out later were  
9 actionable, but they were the same -- virtually the same  
10 statements.

11 THE COURT: Okay.

12 MR. GARDNER: That's completely not the case  
13 here.

14 THE COURT: Thank you.

15 Ms. Poppe, you wanted some more time -- or you wanted  
16 some time on the issue of adequacy of representation.

17 MS. POPPE: Your Honor, our positions with  
18 respect to adequacy, there are certain parts of it that  
19 are stand-alone. There are also certain parts of it that  
20 are directly tied to the issue of the length of the class  
21 period. So it may help --

22 THE COURT: Let's start with whether the  
23 representatives are okay. Then we'll talk about the  
24 expanse of the period.

25 MS. POPPE: Sure. So from an adequacy

1 standpoint, this is one of those cases where it is lawyer  
2 driven. These were --

3 THE COURT: But I do think that's true in most  
4 cases. I really do. I mean, surely your firm does a lot  
5 of drafting of declarations for clients. It may be an  
6 unlovely fact; but I think it is a commonplace, isn't it?

7 MS. POPPE: It is certainly a commonplace, yes,  
8 that the lawyers do a lot of drafting. This here goes to  
9 an extreme though. These cases were brought to the  
10 plaintiffs who would not have even known of their  
11 existence through monitoring agreements and other types of  
12 arrangements with these law firms.

13 And everything about the case that is here, from top  
14 to bottom, has been done just by the lawyers with no  
15 supervision, no insight. I'm not suggesting that the  
16 plaintiffs should be drafting, doing initial drafts or  
17 anything like that; but I am suggesting that they need to  
18 be knowledgeable enough about the case and involved enough  
19 to exercise and comply with their fiduciary obligations to  
20 the class as a whole, not simply cede all responsibility  
21 to the lawyers. That is not consistent with their burden  
22 to demonstrate that they are adequate or be adequate class  
23 representatives here.

24 And like I said, I think there is a spectrum here; and  
25 it may be that the lawyers are allowed to do virtually

1 everything. But they aren't allowed to do everything.  
2 The clients do need to be involved. And here they just  
3 really haven't been involved.

4 THE COURT: Well, they did admit they didn't  
5 draft their declarations, did not review drafts of  
6 previous versions of the complaint, had not attended the  
7 hearing.

8 MS. POPPE: And some of them knew more than  
9 others.

10 THE COURT: But isn't it true that, unlike in the  
11 cases that Conn's relies on, plaintiffs were able to  
12 explain the general theory of the case, knew that the  
13 Court had sustained the original complaint but not all the  
14 misstatements, knew defendants by name and title?

15 I mean, *Enron* was the -- they were unable to name or  
16 even recognize the names of a large number of the parties,  
17 despite the substantial publicity about Enron's collapse,  
18 in the documents sent to them by counsel. Thus, there is  
19 no surprise they could not articulate specific facts about  
20 the defendants' involvement that would support their vague  
21 allegations of fraud.

22 That's a different kettle of fish, isn't it, really?

23 MS. POPPE: To a certain extent, I think some of  
24 the plaintiffs were more knowledgeable than others. I  
25 will give them that.

1       Let me cite some examples. None of them could even  
2 say that they had reviewed drafts of the complaints before  
3 they were filed. That they studied up for their  
4 deposition and could tell you the names of the defendants  
5 is not good enough. They need -- they need to be involved  
6 throughout the whole process. And there is nothing here  
7 showing that they have been involved, that they have been  
8 paying attention, that they have been monitoring.

9       This, to me, is very much like the *Kosmos* case out of  
10 the Northern District of Texas. Judge Boyle looked at  
11 some of these very same issues with respect to adequacy;  
12 and the Court there noted that while it's true that courts  
13 at times have noted that cases -- and those were  
14 Sections 11 and 12 Securities Act cases but similar -- are  
15 especially amenable to class certification and resolution.  
16 It does not follow that a Court should relax its  
17 certification analysis or presume a requirement for  
18 certification is met merely because the claims fall within  
19 that category.

20       And here it is clear that what is going on is this is  
21 the lawyers found this case -- and Judge Boyle in that  
22 case also looked at the monitoring agreement issue. The  
23 lawyers found these cases. The lawyers have done all the  
24 work with very little supervision.

25       THE COURT: Okay. Thank you very much.

1 MS. POPPE: Do you want me to address, also, the  
2 typicality piece?

3 THE COURT: On the class period? Okay. Go  
4 ahead. The typicality piece, that's fine.

5 MS. POPPE: And I'll hold off on doing that until  
6 we talk about the length of the class period as a whole.

7 THE COURT: All right.

8 MS. POPPE: The other issue I think that is  
9 important to talk about in whatever order you would like  
10 is the damages model that needs to be done.

11 THE COURT: Well, okay. Let's take that up. On  
12 the disaggregation point, I just wonder if that's an issue  
13 for us at this stage. I mean, I think Mr. Coffman's  
14 report is sufficient at this stage. Loss causation really  
15 is not appropriate for resolution in a class certification  
16 stage.

17 Coffman opines his out-of-pocket methodology is fully  
18 capable of disaggregating the confounding effects that  
19 plaintiffs have identified. It is somewhat flexible so  
20 that -- it is sufficiently flexible so that it is capable  
21 of being adjusted.

22 And, you know, as I said in *BP*, plaintiffs need to at  
23 this class certification stage present a legally viable,  
24 internally consistent and truly class-wide approach to  
25 calculating damages.

1 And I thought defendants really conceded that a  
2 full-blown damages model was not required at this stage.

3 MS. POPPE: That's right. A full-blown damages  
4 model is not required, but you do need to show that  
5 damages can be calculated on a class-wide basis and in a  
6 way that is consistent with their theory of liability.

7 And here, Coffman's analysis simply did not -- simply  
8 did not do that at all. In fact, the original report that  
9 he wrote doesn't even talk about the theory of liability  
10 or in any way, shape or form attempt to tie the two  
11 together. It's just -- it's just simply not efficient to  
12 even make the showing that needs to be made now.

13 And the analysis in *BP*, to a certain extent, was very  
14 similar where we raised issues the same way the defendants  
15 in *BP* raised issues that the -- that the proffered theory  
16 and methodology did not address.

17 And Coffman had the opportunity to provide some  
18 additional analysis. He submitted an entire other report.  
19 He doesn't go into any more detail with respect to the  
20 issues that were raised.

21 You know, the fact that a vast majority of the  
22 misstatements that they have alleged have been dismissed  
23 by this court, he doesn't address that. He dismisses it  
24 as merely a hypothetical. That's not a hypothetical.  
25 That's happened. He doesn't address that.

1           He doesn't address the fact that there are different  
2 statements and what may or may not happen with respect to  
3 those different statements.

4           He doesn't address here that there will be undeniably  
5 other things, at a minimum, that contributed to those  
6 stock price drops, may have completely caused them.

7           If you look at and you add up the amount of the four  
8 stock price drops -- and again, now we're getting into  
9 questions of the length of the class period that needs to  
10 be talked about separate. But if you add up all four of  
11 them, which is the plaintiffs' theory, it exceeds the  
12 value of Conn's stock on the first day of the class period  
13 by over \$20, by over 50 percent.

14           THE COURT: Okay.

15           MS. POPPE: He doesn't address any of these  
16 things or even touch on them. He gives them very short  
17 shrift. He needs to do more than he has done at this  
18 point and not simply say I will do it later.

19           THE COURT: Okay. All right. Let me hear from  
20 the other side. Thank you very much.

21           MR. GARDNER: Thank you, Your Honor.

22           So damages, I think Your Honor is right on in  
23 analogizing this to your decision in *BP* in which  
24 Mr. Coffman was the expert there.

25           THE COURT: He was.

1 MR. GARDNER: And you certified the post-spill  
2 class because Mr. Coffman articulated that there was a  
3 common methodology, out-of-pocket damages driven by an  
4 event study methodology, that can be employed across the  
5 board for all class members, which makes it a common  
6 question.

7 The Fifth Circuit decision in *BP* recognized that; and  
8 I'm quoting from the Fifth Circuit decision saying,  
9 "Coffman also concludes that his methodology could be  
10 easily updated to remove inflation if a specific  
11 disclosure were eliminated, the misstatements occurred  
12 later or confounding information reduced the relevant  
13 amount for one of the disclosures. In essence, the model  
14 would allow for the removal of one of the purported  
15 corrective steps reducing the total amount of inflation  
16 and the economic loss accordingly."

17 In other words, there is a methodology that can be  
18 applied across the class, which is what the issue at class  
19 certification is.

20 I know defense counsel says at the beginning of her  
21 presentation that a full-blown damage analysis is not  
22 required. Then she goes on in her arguments to suggest  
23 that that's, in fact, exactly what the plaintiffs would  
24 have to do to satisfy her standards.

25 She talks about disaggregating confounding

1 information, isolating the impact of risks and calculating  
2 damages. That's for the expert stage of this case which  
3 follows merits discovery.

4 That's not a class certification issue. And, in fact,  
5 that would run afoul of two Supreme Court decisions. It  
6 would run afoul of the *Halliburton* Supreme Court decision,  
7 which clearly said plaintiffs are not required to prove  
8 loss causation. Whether or not a corrective disclosure is  
9 corrective and how you parse out the different pieces of  
10 information, that is all loss causation. Those are common  
11 questions that the Supreme Court has said are not  
12 appropriate to delve into, not necessary at class  
13 certification because the class rises and falls together  
14 on those questions.

15 Some of their other arguments I would submit -- and I  
16 think we'll get to this a little bit more when we get to  
17 their arguments on the length of the class period. But  
18 their other arguments run afoul of the Supreme Court  
19 decision in *Amgen*, which simply said that proof of  
20 materiality is not necessary at class certification  
21 because those issues rise and fall together.

22 So I would -- I would submit, Your Honor -- well, let  
23 me make one point because the real case that they are  
24 relying upon here is *Comcast*, the Supreme Court decision  
25 in *Comcast*, which was an antitrust decision. And my

1 analysis of *Comcast* is that really to the extent it  
2 applies to securities cases, it applies when you have  
3 multiple theories of liability.

4 In *Comcast* you had, I think, four or five different  
5 theories of liability, of antitrust liability. The Court  
6 dismissed four of them, left only one. And the damage  
7 analysis didn't distinguish between those different  
8 theories of liability, which got the plaintiffs in trouble  
9 in that case.

10 Similarly, in *BP*, Your Honor is very familiar with the  
11 pre-class period damage analysis, one, the plaintiffs  
12 admitted it was a consequential approach, not an  
13 out-of-pocket approach; but Your Honor I don't think had  
14 difficulty accepting that consequential damages would have  
15 been okay.

16 The problem they ran into is they interjected  
17 individual questions. Your Honor's decision said that you  
18 had to gauge each plaintiff's risk tolerance because that  
19 was the theory of liability in the case. Once you  
20 interject individual issues, you no longer can certify the  
21 class.

22 So I would submit, when you are analyzing this, the  
23 thing to keep in mind is: Are these common questions or  
24 are these individual questions? Do these implicate loss  
25 causation, which are common questions? In which case,

1 that's something we deal with down the road and not today.

2 THE COURT: Thank you.

3 MR. GARDNER: Thank you, Your Honor.

4 THE COURT: Do you want another turn at bat on  
5 that issue or have you said everything?

6 MS. POPPE: I'll just make one clarification on  
7 that.

8 THE COURT: Yes.

9 MS. POPPE: It is not our position that they need  
10 to do a full-blown damages model at this point in time.

11 THE COURT: Okay.

12 MS. POPPE: It is simply our position that they  
13 need to articulate how a damages model would take into  
14 account all of these relevant issues, and they have not  
15 even begun to try to do that. They have just dismissed  
16 them.

17 THE COURT: Okay. Let's turn to the class period  
18 then. Do you want to argue that, Mr. Gardner; or do you  
19 want somebody else to do that?

20 MR. GARDNER: I'm happy to do it, Your Honor.

21 So the class period argument, they make two arguments.  
22 One, they argue that the class period should not begin  
23 until September 5th because they argue that the April 3rd,  
24 2013, misrepresentations had no price impact on the stock.  
25 That's the same argument we argued earlier.

1       They say since there is no price impact, there are no  
2 misrepresentations. We can't start the class period until  
3 later. I don't think we need to belabor that point. The  
4 argument is the same, in which the argument is in order to  
5 prove a lack of price impact, they need to do it both at  
6 the time of the misrepresentation and at the time of the  
7 corrective disclosure.

8       They haven't even addressed the corrective disclosures  
9 at all; and therefore, their proof and their argument that  
10 there is no price impact on April 3rd I think fails for  
11 the same reasons we went through before. So that's the  
12 same argument we have already had.

13       The other argument they make is the end of the class  
14 period. Their argument there goes that the class period  
15 should end on February 20th, 2014, because we somehow  
16 admitted in an earlier pleading iteration that that was  
17 when the full truth came out to the market; and therefore,  
18 nobody beyond that could have -- could have purchased  
19 stock and been damaged.

20       The problem with that is it's twofold. It essentially  
21 is saying that the final two corrective disclosures, the  
22 two corrective disclosures that come in at the end of 2014  
23 are not corrective. They don't correct anything. They  
24 don't correct any of the misrepresentations that are still  
25 viable in this case. And that is problematic on two

1 fronts.

2 Again, that's a loss causation question. And I  
3 believe Your Honor in your earlier decision said that  
4 class certification is not the appropriate time to analyze  
5 whether a corrective disclosure is corrective and whether  
6 a corrective disclosure should or shouldn't be in the  
7 case. That is not a class certification issue. That's an  
8 expert issue down the road. It's a loss causation issue.

9 They are also arguing a version of the truth on the  
10 market, which is they are saying as of February 20th --

11 THE COURT: Fraud on the market or --

12 MR. GARDNER: Truth on the market. Truth on the  
13 market is a defense --

14 THE COURT: I see. Okay.

15 MR. GARDNER: -- that the defendants have the  
16 burden of proving. Essentially, it says at a certain day  
17 there was enough information in the market that nobody who  
18 purchased after that period could have been fooled. The  
19 truth was known. And, therefore, if the truth was known,  
20 fraud doesn't go any further.

21 The problem with the truth-on-the-market argument that  
22 they are making is that they are essentially saying that  
23 there is no materiality in that part of the class period,  
24 and that runs afoul of the *Amgen* decision I talked about  
25 earlier.

1       Our position is that these are all questions that come  
2 later. What we are saying is there were  
3 misrepresentations that Your Honor held to be actionable  
4 that inflated the stock -- artificially inflated the stock  
5 or maintained an artificial level of inflation in the  
6 stock.

7       That dissipated over four corrective disclosures. So  
8 until you get to the final corrective disclosure, there is  
9 still inflation caused by those misrepresentations. So  
10 anybody who purchased in that period is damaged by that  
11 inflation.

12           THE COURT: Okay. All right.

13           MR. GARDNER: And the last point is, you know,  
14 their whole argument that we somehow have admitted that  
15 the full truth came out in February I think is -- I think  
16 is nonsensical in the following sense. We filed a  
17 complaint in 2014 before --

18           THE COURT: Yeah. I understand.

19           MR. GARDNER: -- those corrective disclosures  
20 came out. How -- we couldn't have possibly known them.  
21 They didn't exist.

22           THE COURT: I understand that. Okay. Ms. Poppe.

23           MS. POPPE: Your Honor, I do think this is a  
24 unique circumstance here, given the facts here and the  
25 plaintiffs' particular role and admission of knowledge and

1 how that relates to their claim and how this case is a  
2 case in which the Court can and should look at the length  
3 of the class period.

4 As you will recall and as plaintiffs' counsel just  
5 mentioned, they filed the lawsuit originally claiming that  
6 there had been misrepresentations and that there were two  
7 stock drops that reflected their damages. And then the  
8 first -- the first page of that handout I gave you shows  
9 the timeline of this.

10 And then there were two subsequent significant stock  
11 drops down the road when Conn's released information about  
12 its earnings that the market didn't like. And the  
13 plaintiffs are attempting to link those two stock drops  
14 all the way back to the statements that were made  
15 significantly before they even filed the lawsuit.

16 And it is possible, certainly permissible, and in my  
17 opinion extremely appropriate here, to really look at what  
18 the plaintiffs are alleging and whether they should be  
19 entitled to double the size of their class period, double  
20 the size of their damages model in sort of the interim  
21 value of this case by --

22 THE COURT: But wasn't there significant  
23 disclosure on December 9th of 2014?

24 MS. POPPE: You mean September 2nd, 2014?

25 THE COURT: December 9th.

1 MS. POPPE: Oh, sorry. Yes, December 9th. There  
2 were statements that Conn's made about its earnings. The  
3 question is could those statements have possibly -- to the  
4 plaintiffs, who are the plaintiffs in this lawsuit -- have  
5 influenced their beliefs about the -- what they claim to  
6 be false statements months ahead of time.

7 And courts do look at this very issue. This is not  
8 simply us trying to make a loss causation argument now.  
9 It is not us attempting to make a truth-on-the-market  
10 argument now. We are talking about what the plaintiffs  
11 admitted they knew before that ever happened.

12 And one of the cases that we cite, the *LTV Securities*  
13 *Litigation* case out of the Northern District of Texas, I  
14 mean, the Court looked at this very question of what  
15 should the end of the class period be and looked and said  
16 when it's clear the plaintiffs are no longer relying on  
17 those statements, that's when the class period needs to  
18 end.

19 And even the plaintiffs cite this -- the *Countrywide*  
20 case --

21 THE COURT: Yeah.

22 MS. POPPE: -- and argue that that stands for the  
23 proposition that you shouldn't look at that.

24 Well, the Court in *Countrywide* acknowledged that a lot  
25 of courts do look at the very issue here of: Is there a

1 substantial question of fact about when this should end?

2 If there is a substantial question of fact, then the  
3 courts say at that point you need to give them the benefit  
4 of the doubt and let this play out.

5 But if there is not a substantial question of fact --  
6 and here I submit there is not, and I'll walk through that  
7 in a minute. If there is not a substantial question of  
8 fact, then it's appropriate to cut the class period short  
9 and not give the plaintiffs a huge class period that they  
10 will never be able to prove that they haven't even  
11 attempted to justify right now.

12 And here again, I'm not making a loss causation  
13 argument. I'm not making a truth-on-the-market argument  
14 right now. Here what I'm talking about is what the  
15 plaintiffs admitted that they knew.

16 They admitted that they knew and in each of their  
17 depositions they confirmed they believed it at the time  
18 that they knew as of February 20th, 2014, that the 13  
19 alleged misstatements that they claim to be part of this  
20 case, they say they had stopped relying on them at that  
21 point in time. They were alleging them to be false as of  
22 February 20th, 2014.

23 Now, the plaintiffs had originally attempted to  
24 increase their class period by alleging a whole bunch of  
25 additional misrepresentations that supposedly happened

1 after February 20th, 2014; and Your Honor dismissed all of  
2 those. But they still want the benefit of those two large  
3 stock drops.

4 THE COURT: I understand. I understand. Okay.  
5 Thank you.

6 Do you want to say anything further?

7 MR. GARDNER: Just two minutes, Your Honor.

8 THE COURT: Okay.

9 MR. GARDNER: I would say that counsel is  
10 articulating exactly a loss causation issue when she says  
11 that the question is whether you can link these alleged  
12 corrective disclosure dates back to the misrepresentation.  
13 Linking the disclosures to the fraud is loss causation.  
14 That's the essence of loss causation. Not appropriate at  
15 this stage.

16 Again, Your Honor, she is trying to hold us to  
17 admissions in a pleading where the future alleged  
18 corrective disclosures hadn't even occurred yet. We filed  
19 that complaint on July 21st, 2014. The two additional  
20 corrective disclosures come on September and December of  
21 that year.

22 So the issue of whether or not those are corrective,  
23 we'll get to it. That's loss causation. And the class  
24 rises and falls together on that question. There is no  
25 individual issue there. So there is no reason to do that

1 now.

2 The case that she cites -- and, you know, it's not  
3 appropriate to do it; but the fact of the matter is the  
4 final two corrective disclosures -- and this is in the  
5 complaint -- do link. They talk about credit segment  
6 problems and underwriting issues, et cetera. So there is  
7 a link, and we'll prove it when we get to summary judgment  
8 and to trial.

9 The last point, Your Honor, is she cites -- counsel  
10 cites to this *LTV Securities Litigation*. That decision  
11 was in 1980. That's three decades before *Halliburton* was  
12 decided by the Supreme Court saying loss causation is not  
13 necessary at class certification.

14 Thank you, Your Honor.

15 THE COURT: Okay. One more time.

16 MS. POPPE: One more point on this. And I submit  
17 for all the reasons that you can and should shorten the  
18 class period on this basis alone.

19 The other issue that would arise here, though, is if  
20 the plaintiffs want to pursue a case based on people that  
21 bought and sold stock after February 20th, 2014, they are  
22 atypical and not appropriate class representatives to do  
23 that because of their admitted knowledge and the unique  
24 defenses that they would face as a result of that.

25 So in addition to it should be shortened for

1 everybody, at a minimum it needs to be shortened for them  
2 such that they would not be typical representatives after  
3 that date.

4 THE COURT: But have they said -- since the  
5 December 2014 disclosures were made, have they said that  
6 they knew in advance everything that was revealed on  
7 December 9th, 2014?

8 MS. POPPE: Yes. If I understand your question,  
9 yes. They have admitted that they knew that the  
10 statements they claim were false, that they admitted that  
11 they knew they were false and exactly why.

12 THE COURT: But did they know this as to the  
13 statements that Conn's made on December 9th, 2014? How  
14 could they know in advance that -- of the content of the  
15 disclosures, the corrective disclosures made on  
16 December 9th, 2014?

17 MS. POPPE: Well, I guess that gets to the  
18 question of whether those are corrective disclosures or  
19 not. To me, the analysis should be did they -- did they  
20 know that the statements that they allege to be false,  
21 which we by the way disagree were ever false; but it's  
22 their position they were false.

23 THE COURT: Yeah.

24 MS. POPPE: The very basis for what they said,  
25 they said Conn's was underwriting credit for customers who

1 had FICO scores below 500; and they said in the summer of  
2 2014 that's not true. We know -- they put it in their  
3 pleading -- that is not true. Conn's -- they allege  
4 Conn's was underwriting customers below 500 and that it  
5 was not true and they said that 500 was their lower  
6 threshold.

7       They allege all of those things. The very basis for  
8 it, which is their confidential witness allegations, those  
9 never really changed. They never really say we have now  
10 learned more. We have learned additional facts. There  
11 are additional things that would tie those statements to  
12 what happened later.

13       Their confidential witness allegations -- and we put a  
14 red line attached to our response that shows the version  
15 of the confidential witness allegations that they filed in  
16 2014 and then the subsequent one. Those don't change.

17       So their whole theory is based on what happened in the  
18 very first part of the class period, late 2012, early  
19 2013, what happened at that point in time until 2013.  
20 They are not really complaining about anything that  
21 happened later.

22       Most importantly, they are acknowledging that they  
23 knew that those things -- at least in their opinion those  
24 statements were not true.

25       THE COURT: On that limited point, let me hear

1 from the plaintiffs.

2 MR. GARDNER: Thank you, Your Honor. Two points.  
3 One, post *Halliburton* Supreme Court decision, they don't  
4 have -- they don't cite to a single case that has allowed  
5 or the court has truncated a class period on this basis.

6 We have cited a number of them in our brief in which  
7 the courts say that this isn't appropriate to do, whether  
8 a corrective disclosure is corrective or not, et cetera.

9 So I don't think they have any case law support for  
10 this proposition.

11 But this -- I think they made this point in a  
12 footnote, this adequacy argument with regard they  
13 apparently are -- well, let me not be pejorative. The  
14 argument about adequacy, typicality is really a loss  
15 causation argument in disguise.

16 But let me address it because the only way to actually  
17 address it is to dive into the four alleged corrective  
18 disclosures and determine what additional information came  
19 out on the final two corrective disclosures.

20 THE COURT: We don't need to do that.

21 MR. GARDNER: The point is there is new  
22 information that came out. The market wasn't aware that  
23 there was still truth to come out. This price was still  
24 inflated.

25 THE COURT: Okay. All right. I've got it.

1 I'm going to have to reject Conn's position here  
2 again. I think what was said prior to December 9th, 2014,  
3 as to whether they knew all the -- all the negative  
4 information I think can't be binding because there was a  
5 further disclosure made.

6 Secondly, the Fifth Circuit in *Feder, F-e-d-e-r, v.*  
7 *Electronic Data Systems* said that reliance on the  
8 integrity of the market prior to disclosure of alleged  
9 fraud is unlikely to be defeated by post-disclosure  
10 reliance on integrity of the market. So purchasing the  
11 stock after the fraud is revealed doesn't necessarily  
12 destroy typicality.

13 So I am going to -- I am going to grant certification  
14 of the class. I appreciate arguments on both sides. And,  
15 of course, we're still far away from plaintiffs having won  
16 the case. I think all the arguments made by Conn's were  
17 made better than I could have made them, but I am afraid I  
18 cannot -- I cannot acquiesce in Conn's position.

19 Thank you all very much.

20 MR. GARDNER: Thank you, Your Honor.

21 THE COURT: We've got the schedule to worry  
22 about, don't we? I guess I'll grant the extension. I try  
23 to get cases to trial faster than this.

24 MR. GARDNER: I appreciate that, Your Honor.

25 THE COURT: Let's find a trial date in -- I think

1 it's January or February of 2019, right?

2 MR. GARDNER: I don't have the schedule in front  
3 of me; but that sounds about right, yes.

4 THE COURT: You propose a deadline for -- oh, no.  
5 No. No. Never mind. Excuse me. Dispositive motion  
6 deadline you put in April; is that right?

7 MR. GARDNER: Yes. April 16th, I believe.

8 THE COURT: Well then any time after July of --  
9 any time after July 16th of 2018. I'm sorry. I misread  
10 it.

11 MR. GARDNER: I think the last thing we have on  
12 here is October 10th of 2018.

13 THE COURT: Well, October 10th is normally --  
14 that -- you shouldn't need that much time to file motions  
15 in limine. All I care -- all I require in a joint  
16 pretrial order is motions in limine, a list of exhibits, a  
17 list of witnesses and objections to either. That's all I  
18 want.

19 MR. GARDNER: Okay.

20 MS. POPPE: Your Honor, if it would help, we  
21 could confer on dates that would work.

22 THE COURT: Okay. You want to confer. That's  
23 fine. I'll wait to hear from you. That's fine.

24 MR. GARDNER: We'll move that date up, which is  
25 what I'm hearing, Your Honor.

